Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PHILLIP MCCRANIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. DUDLEY WILLIAMS
(Counsel of Record)
P.O. Box 4
301 South Locust Street
Aberdeen, Mississippi 39730
(662) 369-2199

Attorney for Petitioner

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

21pp

QUESTION PRESENTED

Whether the District Court erred in overruling the motion of the accused to suppress the fruits of a search warrant executed on the accused on or about September 1, 1998, on grounds that the warrant failed to set forth probable cause and that the United States acted without good faith in securing and executing such warrant.

LIST OF THE PARTIES

The parties to the proceedings below were Petitioner, Phillip McCranie and the Respondent, United States of America.

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The Petitioner, Phillip McCranie, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *United States of America v. Phillip McCranie.*

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in *United States of America v. Phillip McCranie*, Number 99-60346, review of which is sought, was rendered April 3, 2000, and affirmed Petitioner's Conviction in the United States District Court for the Northern District of Mississippi, on May 12, 1999. It is unreported, but is printed in the Appendix.

JURISDICTION

Phillip McCranie was indicted by the Grand Jury for the Northern District of Mississippi for violation of 18 U.S.C. 2252(a)(2) on September 28, 1998. The judgment of guilt and sentence of the United States District Court for the Northern District of Mississippi were entered on May 12, 1999. Notice of appeal was filed on May 12, 1999.

Phillip McCranie appealed pursuant to Rule 11 (a) (2) of the Federal Rules of Criminal Procedure to the United States Court of Appeals for the Fifth Circuit for review of an adverse decision of the United States District court on a pretrial motion to suppress. On April 3, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the Northern District of Mississippi's judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 10(a) and (c). Supreme Court Rule 10(a) authorizes discretionary

review by this Court on a Writ of Certiorari when a United States Court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Supreme Court Rule 10(c) authorizes discretionary review by this Court on Writ of Certiorari when the United States Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

FEDERAL RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 41(a) (b) (c) (1) (f) and Rule 41. Search and Seizure

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used

as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses tile affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or a to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person

specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

STATEMENT OF THE CASE

Phillip McCranie pled guilty to receiving visual depictions of minors engaged in sexually explicit conduct that had been transported in interstate commerce by computer. This guilty plea was conditional, with approval of the Court and consent of the Government, with McCranie reserving the right on appeal to an adverse ruling on Motion to Suppress.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Court affirmed the District Court's denial of McCranie's Motion to Suppress.

In August, 1998, the United States was conducting investigations of multiple persons believed to be sharing child pornography by use of the internet. Within the Northern District of Mississippi, Agent James Baldwin sought and received a search warrant to search 1617 Land Road, Columbus, Mississippi, within Lowndes County, Mississippi. On September 1, 1998, Agent Baldwin and others executed that search warrant and seized a computer, printer, numerous floppy discs and Cds, along with various other items. This material included thousands of images of visual images of child

pornography. Baldwin also secured a statement from the Appellant, Phillip McCranie, admitting downloading such images from the internet and taking sole responsibility for said items to the exclusion of his wife and children.

McCranie was subsequently arrested and indicted. Prior to trial McCranie moved the trial court to suppress all items seized on or about September 1, 1998, and to further suppress all statements made by McCranie after the execution of said search warrant; for cause showing that the search warrant utilized for said search warrant; for cause showing that the search warrant utilized for said search and seizure was improperly issued by the Magistrate Judge and was an invalid writ, issued without probable cause to support the issuance of said warrant, and not in good faith; and therefore, all such items seized should be suppressed as evidence in this cause.

A hearing was conducted by the trial court on the motion to suppress. At that hearing the affidavit of Phillip McCranie was introduced into evidence [Record on Appeal, Vol. 1, Page 96-1001. The trial court also reviewed and considered the Application and Affidavit for Search Warrant [Record on Appeal, Vol. 1, Page 37-71]. The government offered as evidence two documents, a "seen.txtfile" and pages described as "information from Baldock's computer" [Record on Appeal, Vol. 2, Page 21].

The Petitioner, Phillip McCranie, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *United States of America v. Phillip McCranie.*

REASONS FOR GRANTING THE WRIT

1. The District Court erred in overruling the Motion of the Petitioner to suppress the fruits of a Search Warrant which failed to set forth probable cause and where the United States did not act in good faith in securing and executing the warrant.

The application and affidavit in support of the search warrant submitted by the government to the issuing magistrate judge in this case was deficient and failed to establish probable cause; further, he government both included and omitted matters of material information from such application and affidavit that would have made clear the lack of probable cause. The government acted with reckless disregard for the truth in submitting the application and affidavit and is not entitled to a good faith exception.

At all times relevant, Appellant Phillip McCranie accessed the internet via dial up service through EBI, an internet service provider in Columbus, Mississippi. McCranie's user name was "hijinx" and his Internet Service Provider address was "hijinx@ebicom.net".

In October, 1997, law enforcement officials in the United Kingdom received information about a person engaged in distributing child pornography on the internet. This person was known on the internet as "Sheepy", and was in fact an adult male named "Baldock". Baldock was arrested and his computer was seized and examined. From that computer, a document was recovered. That document, Exhibit G-1, appeared to describe an organization of persons devoted to collecting and trading images of child pornography. That document identified one of the officials of that organization as

"Hijinx", and apparent internet user name. This document does not reveal any Internet Service Provider address.

In February, 1998, Gary Salt was apprehended in the United Kingdom. His computer was examined and from it a file was printed called "seen.txt", Exhibit G-2, which listed approximately 90 individuals that Salt had encountered in Internet Relay Channels (IRCs), those 90 individuals being persons accessing the internet through United States based Internet Service Providers (ISPs).

IRCs are known to be the primary forums for child pornography that have limited access. Generally speaking, one must have passwords and be a member of an organization to enter such forums. The "seen.txt" file showed that "hijinx@ebicom.net" had been present in the channel on one occasion for a very brief length of time. This information was more than six months old at the time of the government's application and affidavit for a search warrant for McCranie, and was not included in the affidavit submitted to the magistrate judge.

The affidavit in support of the application for search warrant is concisely summarized as: in October, 1997, Baldock was arrested and documents describing an organization were recovered which listed "hijinx" as an official. In February, 1998, Salt was arrested. In August, 1998, a computer at 1617 Land Road, Columbus, Mississippi, using a phone dial up service. The user name for that account was "hijinx". There were extended periods of time in which hijinx was on-line. In August, 1998, forensic computer software used by the government in its investigation revealed that "hijinx" was in the illicit IRC channels.

At the hearing on the motion to suppress, the government revealed that the IRC Activity Log, Exhibit D-2 had been faxed to both Agent Baldwin and Assistant United States Attorney Paul Roberts just before completion of the affidavit in support of the search warrant application. According to Roberts, they could not look at the log and determine if the log included hijinx@ebicom.net was in the IRC channels. The affidavit was drafted to simply say "a" hijinx was in the channels in August, 1998. The IRC Activity Log was not revealed to the issuing magistrate judge.

More specifically, the Appellant shows that the affidavit tendered to the Magistrate Judge in support of the search warrant was infirm in the following regards:

The affidavit recites that on October 17, 1997, there was recovery of certain files from the computer of Baldock, a citizen of the United Kingdom, known on the internet as "Sheepy". Within the files recovered from the computer of Sheepy were documents that identified a user name on the internet, "Hijinx", as being a principal in an organization active in child pornography. The affidavit sets forth no corroboration of this hearsay with respect to the true identity of "Hijinx", and no information set forth in the affidavit presents any substantial basis for crediting such hearsay with respect to "Hijinx". There is no information whereby it may rationally be inferred that the "Hijinx" noted in the files of "Sheepy" is in fact the Appellant herein, who in fact was "hijinx@ebicom.net". *Illinois v Gates*, 103 S.Ct. 2317 (1983); *United States v. Mitchell*, 31 F.3d 271 (Fifth C.A., 1994); *United States v. Laury*, 985 F.2d 1293 (Fifth CA., 1993). The affidavit utterly fails to set forth any facts to connect the "Hijinx" referenced in the "Sheepy" files with the Defendant in this case, and is a "bare bones" affidavit in such respect.

The affidavit recites that in February, 1998, British authorities seized a computer from an individual named Salt. From Salt's computer they recovered a log file called "seen.txt" which purports to identify other persons encountered by Salt in the IRC channels primarily devoted to child pornography. Although the affidavit claims that 90 users connect to the internet through internet service providers in the United States, the affidavit fails to allege any connection between Salt and the Appellant in this case, "hijinx@ebicom.net". The affidavit correctly sets forth that investigators recovered records from EBI Communications in Columbus, Mississippi, that indicate the Defendant herein had an account with said ISP, with an internet username of "hijinx". However, there is no information set forth attempting to link the "hijinx" at EBI Communications to the "Hijinx" within the documents recovered from "Sheepy".

The affidavit correctly sets forth that the telephone number of the Defendant herein dedicated to the dial up connection to the internet provided by EBI Communications was in use for long periods of time in August, 1998. The affidavit sets forth that such prolonged connection to the internet is consistent with illegal transmission and retrieval of pornographic images; however, the affidavit fails to set forth any factual allegations that the Defendant in fact transmitted or received any pornographic images at any time. Further, prolonged access to the internet is consistent with many wholly lawful activities. See: *United States v. Clark,* 31 F.3d 831 (Ninth CA., 1994), finding that "high" electrical consumption is consistent with numerous entirely legal activities, as opposed to powering grow lights for marijuana production.

Paragraph 28 of the affidavit states that between July 14, 1998, and August 18, 1998, that "... a user using the nickname Hijinx . . ." was present in several IRC channels identified as sites of child pornography activity; and further states that "hijinx", referring directly to McCranie, was accessing the internet through EBI Communications during the same time period, same being known through telephone and use logs. Paragraph 38 of the affidavit uses the term "Hijinx" two times to refer to McCranie, the subject of the desired search warrant.

The language referred to above was calculated to bring the Magistrate Judge to conclude that the "Hijinx" present in the IRC channels in August, 1998, was the same "Hijinx" found in the "Sheepy" computer, and was the same McCranie, hijinx@ebicom.net, the person they decided to search. In such respect, the affidavit is a deliberate, or at least a reckless, false statement; and in addition, the false information was essential to the Magistrate Judge making a finding of probable cause. *Franks v. Delaware,* 438 U.S. 154 (1978). It was well known by Senior Special Agent Nicks, a computer and internet expert, that the "hijinx" noted on the IRC activity log was in fact not any person accessing the internet through EBI Communications, and specifically not McCranie, hijinx@ebicom.net. It was further well known to the government due to the entries on the IRC Activity Log that "hijinx" is a very common user name on the internet, and that could be used by any number of individuals on the internet. The only way to differentiate those persons is to examine the ISP addresses.

At the hearing on the motion to suppress before the trial court, the government conceded that it is not possible to link McCranie to the activity described in

Paragraph 28 of the affidavit. The government admits that the user name of "hijinx" could be used by ". . . any number of individuals in IRC channels . . .", see governments Supplemental Response in Opposition, paragraph 2, Record on Appeal, Vol. 1, Page 33, et seq. That is information that should have been included in the affidavit. If such omitted material had been included, clearly the affidavit would have failed to support a finding of probable cause. The conduct described by Assistant United States Attorney Roberts at the hearing on the motion to suppress in how the IRC Activity Log was used was reckless. Reckless omission of material facts are the functional equivalent of false or misleading representations. *United States v. Jacobs,* 986 F.2d 1231 (Eighth CA., 1993). Although the court is bound to give deference to the findings of the magistrate judge, that deference is limited in a situation where there must be an inquiry into the knowing or reckless falsity of the affidavit in support of the search warrant. *United States v. Leon,* 468 U.S. 897 (1984).

When the affidavit is considered without the false information set forth in Paragraph 28, the affidavit, viewed in the best light to the government, sets forth the following "bare bones" facts:

1. Information seized from the computer of "Sheepy", a known child pornographer, lists a username of "Hijinx" as a "botmaster" and/or "Ircop" within certain IRC channels linked to child pornography activities;

2. Information seized from the computer of one Salt suggests that ninety persons with internet access through U.S. based ISPs were active in the IRC channels linked to child pornography activities; and

3. The Defendant herein had an account with EBI Communications wherein he used the user name of "hijinx", and that said Defendant spent a great deal of time accessing the internet in August, 1998.

The affidavit totally fails to make any direct assertion that the "Hijinx" found in the computer of "Sheepy" is one and the same as McCranie, hijinx@ebicom.net. The affidavit was drafted to bring the reader to the erroneous conclusion that McCranie, as hijinx@ebicom.net, was active in the illicit IRC channels in July and August, 1998. Thus, the government could not have believed in good faith that the warrant was in fact valid. The trial court erred in overruling the motion to suppress. The affidavit presented to the magistrate judge was false, either deliberately or recklessly, by both representations and omissions, and there is thus no issue of objective good faith. *United States v. Leon,* 468 U.S. 897 (1984). The remaining portions of the affidavit fails to establish sufficient probable cause under the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213 (1983).

CONCLUSION

The Government is not entitled to claim the good faith exception under the facts and circumstances of this case. After deletion of those statements which were recklessly made material misstatements, the remaining portion of the affidavit was insufficient to establish probable cause for the search of McCranie's residence and computer.

Respectfully submitted,

J. Dudley Williams
P.O. Box 4
301 South Locust Street
Aberdeen, Mississippi 39730
(662) 369-2199

Attorney for Petitioner.
Phillip McCranie

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-60346
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PHILLIP McCRANIE,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:98-CR-84-B-D

[Filed: April 3, 2000]

Before JONES, DUHE, and STEWART, Circuit Judges.

PER CURIAM:[1]

Phillip McCranie pleaded guilty to receiving visual depictions of minors engaged in sexually explicit conduct that had been transported in interstate commerce by computer. McCranie appeals the district court's denial of his motion to suppress. He argues that the affidavit in support of the search warrant executed on his residence included deliberately false or recklessly misleading statements made in an attempt to induce the magistrate judge to issue a warrant on facts which did not give rise to probable cause.

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[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Even if it is assumed that the statements to which McCranie objects were recklessly made material misstatements, a common-sense reading of the remaining portion of the affidavit was sufficient to establish probable cause to believe that McCranie's residence (more specifically, his computer) contained evidence of child pornography. *See United States v. Alvarez,* 127 F.3d 372m (sic) 373 (5th Cir. 1997); *United States v. Polk,* 118 F.3d 286, 296 (5th Cir. 1997); *United States v. Brown,* 941 F.2d 1300, 1302 (5th Cir. 1991). Accordingly, the district court's denial of the motion to suppress is AFFIRMED.